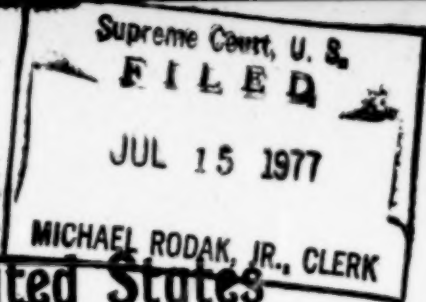


IN THE
Supreme Court of the United States



October Term, 1976.

No. **77-93**

MASONIC HOME OF DELAWARE, INCORPORATED,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

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Incorporated.*

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MASONIC HOME OF DELAWARE, INCORPORATED
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

—
The petitioner, Masonic Home of Delaware, Incorporated, prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 9, 1977, and denying petitioner's Petition for Writ of Mandamus to the United States District Court for the District of Delaware.

OPINIONS BELOW.

No formal opinion was issued by the District Court; the order of the District Court striking petitioner's demand for a jury trial is set forth in Appendix A, p. A2. No opinion was rendered by the Court of Appeals; the order of the Court of Appeals denying the Petition For Writ Of Mandamus is also set forth in Appendix A, p. A1.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1) and 28 U. S. C. § 2101(c).

The order of the Court of Appeals, denying the Petition For Writ Of Mandamus was entered on June 9, 1977. No petition for rehearing was filed. This petition for certiorari was filed within ninety days of that date.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals err as a matter of law in denying petitioner Masonic Home's petition for writ of mandamus to obtain a trial by jury in the District Court?

2. Does the Seventh Amendment of the Constitution of the United States guarantee a trial by jury to a defendant-employer in a Title VII sex-discrimination action where the complaint includes a claim for general compensatory damages to be awarded pursuant to a declaratory judgment?

3. Where plaintiff seeks a declaratory judgment pursuant to 28 U. S. C. § 2201 and Federal Rule of Civil Procedure 57 on a "statutory tort", an action brought to redress an alleged violation of Title VII rights, is the defendant entitled to a jury trial when properly and timely sought?

**CONSTITUTIONAL PROVISIONS, STATUTES,
AND RULES INVOLVED.**

Seventh Amendment of the Constitution of the United States Appendix A

28 U. S. C. § 1254(1) Appendix A

28 U. S. C. § 2101(c) Appendix A

28 U. S. C. § 2201 Appendix A

28 U. S. C. § 2202 Appendix A

The Civil Rights Act of 1964, Title VII

§ 703(a)(1) and (2)
42 U. S. C. § 2000e-2(a)(1) and (2) Appendix A

§ 706(f)(3)
42 U. S. C. § 2000e-5(f)(3) Appendix A

§ 706(g)
42 U. S. C. § 2000e-5(g) Appendix A

Federal Rules.

Federal Rules of Civil Procedure Rule 57 Appendix A

STATEMENT OF THE CASE.

Frederick Fesel, as plaintiff, filed this Title VII sex discrimination action in the District Court for the District of Delaware on July 16, 1976, alleging, inter alia, that he was denied employment by the Masonic Home of Delaware, Incorporated, as a nurse's aide in violation of § 703 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2. The complaint alleges that the District Court has jurisdiction pursuant to 28 U. S. C. § 2201, 28 U. S. C. § 2202, and Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq.

By responsive pleading filed within the time permitted by Rule 12(a) of the Federal Rules of Civil Procedure, and endorsed with the words "Defendant Demands Trial By Jury" below the District Court caption of the case, defendant Masonic Home denied liability.

The complaint, which has not been amended, requested that the Court grant the following relief.

"(a) Enter a declaratory judgment declaring the aforesaid acts of defendant to be in violation of the Constitution and the laws of the United States.

"(b) Issue a permanent injunction requiring the defendant to cease discrimination against males who apply for employment, and to hire plaintiff.

"(c) Require the defendant to establish and fairly implement non-discriminatory plans and programs with respect to hiring.

"(d) Require the defendant to pay compensatory damages to plaintiff in the amount of \$1,000.

"(e) Require defendant to pay all costs and attorney's fees involved in this action.

"(f) Award such other and further relief as the Court deems appropriate."

The Masonic Home of Delaware is a retirement home affiliated with the Masonic Order of Delaware. Admission to the Home is limited to Masons and their wives or widows. The current population at the defendant Home consists of 22 women and 8 men; of the 22 women who range in age from 70 to 95 years, seven are "total care" patients. These seven are unable to care for themselves and must be assisted by a nurse's aide in all activities in their daily routine. This "total care" includes help involving the most intimate personal activities; the nurse's aide must assist with tub-bathing, dressing, use of toilet facilities, undressing and placing into night clothes, and caring for the guests at night, which often requires changing of incontinence pads. Guests must often be placed on commodes by nurse's aides and cleansed and dried when finished, a procedure which requires the nurse's aide assisting the guest to have direct contact with the guest's genital and rectal area. Some of the female guests suffer from hearing loss, making communication difficult, and some suffer a degree of senility. These guests demand that nurse's aides be female and will not consent to being served by male nurse's aides.

On the daily 3 P. M. to 11 P. M. shift, and again four nights a week on the 11 P. M. to 7 A. M. shift, only one nurse's aide is on duty at the Home and thus must assist any guest in need of care. No males have ever been employed by the Home as Registered Nurses, Licensed Practical Nurses, or Nurse's Aides.

On May 27, 1977, plaintiff Fesel presented a motion requesting that defendant's "request" for a jury trial be denied. After a hearing on plaintiff's motion, the District Court on May 31, 1977, ordered that defendant's demand for a jury trial be stricken (See Order of District Court, Appendix A, p. A2).

Thereafter, on June 8, 1977, the Masonic Home filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit. The petition sought mandamus directing that the District Court reinstate the defendant's demand for jury trial and that the trial of the cause in the District Court be to a jury. By order dated June 9, 1977, the Court of Appeals denied the petition (See Order of Court of Appeals, Appendix A, p. A1).

The present status of the case in the District Court is that discovery is continuing with a view toward trial to commence on October 25, 1977, per order of the District Court.

REASONS WHY THE WRIT SHOULD ISSUE.

I. The Question of Jury Trial Is Properly Before the Court.

Where the district court has improperly denied a litigant's demand for trial by jury, mandamus from the court of appeals may be sought prior to trial. *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U. S. 469 (1962). Upon denial of mandamus by the court of appeals, review by the Supreme Court is by writ of certiorari. *Dairy Queen, Inc. v. Wood*, *supra*.

II. The Denial of Mandamus by the Court of Appeals Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The Seventh Amendment of the Constitution of the United States preserves the right to trial by jury in suits at common law where the amount in controversy exceeds twenty dollars. The Supreme Court has not ruled on the question of the right to trial by jury where general compensatory damages are sought by the complaint in conjunction with the more commonly sought equitable forms of relief available under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq.; this Court expressly refused to consider the issue of jury trial in Title VII cases in *Curtis v. Loether*, 415 U. S. 189 (1974).

III. The Denial of Mandamus by the Court of Appeals Decided a Question of Federal Law in a Way in Conflict With the Applicable Decisions of This Court.

Ross v. Bernhard, 396 U. S. 531 (1970) establishes three factors governing the right to trial by jury under the Seventh Amendment: custom before the merger of law and equity; the remedy sought; and the practical abilities and limitations of juries.

Thus, the initial focus under the Ross analysis is upon the characteristics of the type of claim involved. It has been recognized that an action brought to redress alleged violations of federal civil rights statutes is generically classified as a tort action, *Tillman v. Wheaton-Haven Recreation Association*, 517 F. 2d 1141, 1143 (4th Cir. 1975), akin to an action for defamation or intentional infliction of mental distress. *Curtis v. Loether, supra*, 415 U. S., at 195-196, n. 10. As a "statutory tort", therefore, an action to redress alleged violations of Title VII rights is the type of action that historically would have been brought in a court of law.

The type of relief sought in the complaint also enters into the Ross formula; in the instant case, the relief sought by plaintiff consists of compensatory damages awarded pursuant to a declaratory judgment. Compensatory damages sought pursuant to suit on a tort claim are a traditional legal remedy. *United States v. Yellow Cab Company*, 340 U. S. 543 (1951); *Curtis v. Loether, supra*. Moreover, a request for a declaratory judgment, made in the context of an action sounding in tort, is a further request for legal relief. *Simler v. Conner*, 372 U. S. 221 (1963); Federal Rules of Civil Procedure, Rule 57.

The final examination under Ross bears upon the abilities of the jury; in this regard, it suffices to observe that the issues in a Title VII case are readily handled by a jury.

Although various decisions of the courts of appeals have rejected the claim of right to trial by jury, these opinions have been rendered in the context of requests for equitable forms of relief. Awards of back pay have been held to be equitable in nature, *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975), but such awards are to be sharply distinguished from general compensatory damages which are awarded as a direct result of violation of a

legally protected right. Where awards of damages follow as a matter of course from a finding of wrongdoing, the Seventh Amendment is applicable. Rehnquist, J. concurring in *Albemarle Paper Co. v. Moody, supra*. Compensatory damages do not involve the equitable discretion of the court and are thus awarded as a "matter of course".

Title VII does not in express terms proscribe awards of general compensatory damages. See 42 U. S. C. § 2000e-5(g) which authorizes negative injunctive relief and "affirmative action" but does not limit the type of relief which the court may grant.

As plaintiff has sought compensatory damages and has therefore sought a remedy which brings the instant case within the ambit of the Seventh Amendment, trial must be to a jury. As timely demand was made by the defendant and ordered stricken by the District Court, mandamus should have issued from the Court of Appeals. This Court should grant the writ of certiorari to review and correct the error of the lower courts.

CONCLUSION.

WHEREFORE, the Petitioner Masonic Home of Delaware, Incorporated respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner, Masonic
Home of Delaware, Incorporated.

APPENDIX A.

Opinions Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1742

MASONIC HOME OF DELAWARE, INCORPORATED,
a Delaware corporation,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE,
Respondent.

Present: WEIS, STALEY and GARTH, *Circuit Judges.*

ORDER

Upon consideration of the Petition of Masonic Home
of Delaware, Incorporated for Writ of Mandamus, it is
ORDERED that the Petition is denied.

By THE COURT,

/s/ JOSEPH F. WEIS, JR.
Circuit Judge

DATED: June 9, 1977

Order (May 31, 1977)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CIVIL ACTION No. 76-238

FREDERICK FESEL,

Plaintiff,

v.

MASONIC HOME OF DELAWARE, INC.,
a Delaware corporation,

Defendant.

ORDER

THIS 31st day of May, 1977, IT IS ORDERED that:

1. Defendants' demand for a jury trial is stricken.
Marshall v. Electric Hose & Rubber, 413 F. Supp. 663, 666
(D. Del. 1976).

/s/ WALTER K. STAPLETON
United States District Judge

CONSTITUTIONAL PROVISION.

United States Constitution, Seventh Amendment.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL STATUTES.

28 U. S. C. § 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U. S. C. § 2101(c).

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U. S. C. § 2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration

shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U. S. C. § 2202.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

The Civil Rights Act of 1964, Title VII.

§ 703(a)(1) and (2), 42 U. S. C. § 2000e-2(a)(1) and (2)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 706(f)(3), 42 U. S. C. § 2000e-5(f)(3)

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would

have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

§ 706(g), 42 U. S. C. § 2000e-5(g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

FEDERAL RULES.

Federal Rules of Civil Procedure Rule 57.

The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C. § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.